No. 3069

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC COAST CASUALTY COMPANY
(a corporation),
Appellant,

vs.

S. G. HARVEY,
Appellee.

BRIEF FOR APPELLANT.

BERT SCHLESINGER,
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Statement of Facts.

This is an appeal taken by John C. Lynch, Esq., in his capacity as Receiver of the Pacific Coast Casualty Company, a corporation, from an order allowing the claim of S. G. Harvey in the amount of seven hundred seventy-three and 20/100 dollars ($773.20) and interest against the estate in the receiver's hands.

A writ of error was also allowed and is taken on same record.

The claim is made upon an appeal bond which was executed by the Pacific Coast Casualty Company in a proceeding entitled "B. S. Stowe, Trustee

in Bankruptcy of the Estate of J. Downey Harvey, vs. S. G. Harvey".

In the proceeding prosecuted by Stowe as Trustee in Bankruptcy against S. G. Harvey a judgment in favor of the complainant, Stowe, had been rendered in the United States District Court. From that judgment the defendant, S. G. Harvey, took an appeal to the United States Circuit Court of Appeals of the Ninth Circuit, and, after due proceedings had, the appeal of S. G. Harvey was allowed and the judgment of the District Court was ordered reversed.

Thereupon, Stowe, Trustee, took an appeal to the United States Supreme Court, the bankruptcy statutes providing that in such a case an appeal to the United States Supreme Court was allowed as a matter of right.

It was on this appeal taken by Stowe, Trustee, from the decision of the United States Circuit Court of Appeals to the United States Supreme Court that the bond in question was given. The condition of the bond was as follows (see transcript page 24):

> "If said appellant (Stowe, trustee in bankruptcy) shall prosecute said appeal to effect and answer all damages and costs if he fail to make said appeal good then the above obligation shall be void; otherwise to remain in full force and effect."

This bond was executed by virtue of the order of court allowing the appeal and providing further (transcript page 28)

"That this shall operate as a supersedeas upon the petitioner filing a bond in the sum of five thousand dollars ($5000.00)".

The United States Supreme Court affirmed the decision of the United States Circuit Court of Appeal and sent its mandate direct to the United States District Court ordering that the action of Stowe, Trustee in Bankruptcy, against S. G. Harvey be dismissed. Thereupon that action was dismissed with costs to S. G. Harvey, and in due time the defendant filed her bill of costs in the sum of $773.20 (no part of which was incurred subsequent to giving said bond). This amount she is now endeavoring to charge against the bond executed by the Pacific Coast Casualty Company. These are the costs incurred by the defendant before Stowe's appeal was taken. The costs incurred by her in the United States Supreme Court have been paid.

Specifications of Error.

1. The order allowing the claim of Mrs. Harvey against the Receiver of the Pacific Coast Casualty Company is erroneous for the reason that Section 25c of the Bankruptcy Act provides that Trustees in Bankruptcy shall not be required to give bond when they take appeals or sue out writs of error. Consequently, the order requiring the Trustee in Bankruptcy to give bond as a condition to allowing his appeal was in contravention of the

statute, and the bond given in pursuance of that order is without consideration and void.

2. The order allowing the claim against the receiver is erroneous for the reason that at the time the appeal from the decision of the Circuit Court of Appeals was taken by the Trustee in Bankruptcy there was no judgment in existence against him upon which an execution could issue, as the judgment of the District Court was a judgment in his favor, and that judgment was not reversed until after the whole case had been heard and decided by the United States Supreme Court. Consequently the bond given could not operate as a supersedeas as there was no possibility of a writ of execution issuing against the Trustee in Bankruptcy until after his appeal had been finally determined.

Points and Authorities for Appellant.

A TRUSTEE IN BANKRUPTCY IS NOT REQUIRED TO FILE BOND ON ANY APPEAL TAKEN BY HIM.

As a general rule every appellant is required to file a bond as a condition to taking his appeal under Section 1000 of the Revised Statute, which provides:

> "Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States, or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute

> his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

The provisions of this statute provide:

1. That where the writ is a supersedeas the bond shall be charged with damages and costs, and

2. Where it is not a supersedeas it shall be charged with costs only.

This provision is supplemented by Section 25c of the Bankruptcy Act, which is a special enactment conferring extraordinary privileges upon the Trustee in Bankruptcy. It provides:

> "Trustees shall not be required to give bond when they take appeals and sue out writs of error."

Apparently the language of this section is so broad that Trustees in Bankruptcy are not required to give a bond in any case even though the writ operates as a supersedeas. In the following section of our brief, however, we will show that the appeal in this case did not operate as a supersedeas, so that the distinction is unimportant for the purposes of the case at bar.

We have then a plain provision of the statute which confers upon Trustees in Bankruptcy the right to take an appeal without giving a bond to cover costs. In the instant case the judge who allowed our appeal made his order requiring that a bond in the sum of five thousand dollars ($5000.00)

be given, and that the bond operate as a supersedeas. The making of that order, however, cannot have the effect of limiting the rights of the Trustee in Bankruptcy. It was an order which violated the terms of the statute and imposed upon the Trustee an involuntary burden which the court had no right to impose. A bond given in compliance with such an unlawful order is void, and in the lower court the respondents freely admitted that such was the case. In their brief filed in the lower court they say:

> "As a matter of course if a bond is exacted by order of a court or officer where none is necessary, it will be void, on the ground that it was exacted *colore officii.*"
>
> U. S. v. Tingey, 5 Pet. 115 at 129."

The rule then is unquestioned that, at least in so far as the bond of the Pacific Coast Casualty Company was a bond to cover costs, it was exacted, by the judge who allowed the appeal, in defiance of the statutory privilege conferred upon Trustees in Bankruptcy. As it was exacted without right and involuntarily given by the Trustee in Bankruptcy it is void either as a statutory bond or as a common law bond, and no costs incurred in the action can be enforced against it.

Collier On Bankruptcy, 6th Edition, page 313, states that the provision of the bankruptcy statute, providing that the Trustee shall not be required to give bond when he takes appeals and sues out writs of errors, is so broad that it applies even to writs

of error issued by the United States Supreme Court on final judgment in a state court. Apparently, the provisions of the statute have been liberally construed so as to apply even to proceedings pending in a state court.

Kountz v. Hotel Company, 107 U. S. 378, at 395. There the court considers the case where an appeal bond contained a condition more onerous than that prescribed by the statute. It says:

> "As the Judge had no authority to require such a condition to be inserted in the bond, and probably was not aware of its insertion in this case, and the party ought not to be deprived of his right of appeal upon the terms which the law prescribes, we should be very reluctant to hold that this was a voluntary bond knowingly entered into beyond the requirements of the statute."

Such is the opinion of the United States Supreme Court upon a case identical in principle with that presented on this appeal.

The reason for this rule probably is that the Trustee in Bankruptcy is deemed to be an officer of court, acting under and in pursuance of an order of court, and subject at all times, to the control of the court. Such being the case there is no reason why he should not be permitted to take an appeal on the same liberal terms as those taken by the "United States or by direction of any department of the government" (Sec. 1000 Rev. St.).

THE BOND EXECUTED BY THE PACIFIC COAST CASUALTY COMPANY IS NOT A SUPERSEDEAS BOND.

The condition which makes a supersedeas bond necessary is the existence of a judgment upon which an execution may issue. If there be in existence no judgment against the appellant which would justify the issuance of an execution against him there is no need of a supersedeas bond for the very simple reason that there is nothing to supersede.

See

Kountz v. Hotel Co., 107 U. S. 378 at 391;
Green Bay v. Norrie, (C. C. A.) 128 Fed. 896
aff'g 118 Fed.923

The "just damages for delay" provided for in Rule 29 of the Supreme Court refers directly to damages caused by the delay in the issuance of the writ of execution.

Now in the instant case the decree of the lower court was in favor of the appellant who gave this bond. The decree of the lower court was the only one upon which, under any circumstances, an execution could be issued. The Circuit Court of Appeals did no more than order the lower court to reverse its decree and enter its judgment in favor of the defendant, S. G. Harvey. If a mandate should be received by the lower court upon such reversal it would be its duty to obey it and enter the decree as directed, but until such a manadate should be received and a decree entered, no execution against the Trustee in Bankruptcy could be issued. But here the Trustee in Bankruptcy was not satisfied

with the decision which the Circuit Court of Appeals had made so he himself took an appeal to the United States Supreme Court, and under the rule in equity cases such as this, the whole case was removed to the United States Supreme Court for consideration both on the law and the facts. That court reviewed the whole case, and when it reached its decision sent its mandate directly to the District Court of the United States. This was in accordance with the law and the universal practice.

Houghton v. Burden, 228 U. S. 161.

The effect of the Trustee's appeal from the decree of the Circuit Court of Appeals was to transfer jurisdiction to the Supreme Court of the United States and render it impossible for the mandate of the Circuit Court of Appeals to be issued. In fact the decision of the Circuit Court of Appeals never did have any effect, because the Supreme Court's mandate went direct to the District Court and no mandate in this particular case was ever sent by the Circuit Court of Appeals to the District Court. There never was a judgment upon which a writ of execution could issue in this case until after the lower court had reversed its decree in accordance with the mandate which it received from the Supreme Court of the United States at a time many months after the bond here in question had been executed.

Moreover, the judgment which was finally entered in favor of S. G. Harvey was for costs, and it was necessary for her to file her cost bill and have the

costs taxed in the District Court before any judgment could be entered. This was not done until after the whole case was decided by the United States Supreme Court.

In the case of Hovey v. McDonald, 109 U. S. 151; 27 L. Ed. 888, a prohibitory injunction was issued by the court at the request of the complainant, and the defendant in the action appealed. The defendant, believing that it was a proper case for a supersedeas, filed what purported to be a supersedeas bond.

The court held, however, that a prohibitory injunction was not the subject of a supersedeas and that the bond so filed did not have that effect. The court defines the supersedeas at page 159, where it says:

> "A supersedeas, properly so called, is the suspension of the power of the *court below* to issue an execution on the judgment or a decree appealed from; or, if a writ of execution has issued, is a prohibition emanating from the court of appeal against the execution of the writ. It operates from the time of the completion of those acts which are a requisite to call it into existence."

The case of Green Bay v. Norrie, 128 Fed. 896 (C. C. A. 2nd), was one in which a prohibitory injunction had been awarded to the plaintiff by the trial court, and upon appeal the defendant gave a supersedeas bond under the mistaken impression that he could stay the operation of the injunction by so doing. The plaintiff in the case, under the

same mistaken impression, did not attempt to enforce the injunction because a supersedeas had been given, and, upon the affirmance of the judgment brought suit on the supersedeas bond. It was held that the supersedeas did not actually stay the decree of the lower court, and consequently no recovery could be had against the bond.

These authorities seem to define very clearly the province of a supersedeas bond and the conditions under which it operates. If it does not operate as a supersedeas it cannot be enforced on the elementary theory that there is no consideration for the charge against it.

The judgment, which forms the basis of the claim of S. G. Harvey against the receiver, was entered, as the record shows, some time after July 11th, 1916 (Trans., p. 13). The cost bill, which forms the basis of the judgment, was presented to the court in pursuance of the order made on that date. The bond, against which this judgment is sought to be enforced, was approved on December 15th, 1914, considerably more than a year before the judgment was entered (Trans., p. 24). How can it be said that the bond operated as a supersedeas on a judgment which was not in existence at the time the bond was executed? Such a contention is not supported by any logical principle and is contrary to all the decisions on the subject.

We respectfully submit that the order should be reversed.

Dated, San Francisco,
February 15, 1918.

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